

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF HUMAN RIGHTS

Dolores Rivera Gonzalez,

Complainant,

v.

Chi-Chi's Restaurants,

Employer.

FINDINGS OF FACT,

CONCLUSIONS OF LAW AND ORDER

The above-entitled matter came on for hearing in Minneapolis before Administrative Law Judge Richard C. Luis on November 15, 16, and 17 and December 14 and 21, 1994.

Sonja Dunnwald Peterson, Esquire and Donald E. Horton, Esquire, Horton and Associates, 700 Title Insurance Building, 400 2nd Avenue South, Minneapolis, Minnesota 55401-2402, appeared on behalf of the Complainant. Daryle L. Uphoff, Esquire, and Sally J. Whiteside, Esquire, Lindquist and Vennum, 4200 IDS Center, 80 South 8th Street, Minneapolis, Minnesota 55402, appeared on behalf of the Employer (Respondent). The record closed on March 10, 1995.

NOTICE

Pursuant to Minn. Stat. § 363.071, subds. 2 and 3, this Order is the final decision in this case. Under Minn. Stat. § 362.072, the Commissioner of Human Rights or any person aggrieved by this decision may seek judicial review pursuant to Minn. Stat. §§ 14.63-14.69.

STATEMENT OF ISSUES

1. Whether the Complainant was a victim of sexual harassment by her^[1] supervisor in the fall of 1992.

2. Whether the Employer discriminated against the Complainant based on national origin (the Complainant is Cuban) by denying compensation (paid vacation) to her while awarding paid vacation to non-Hispanic employees similarly situated, or by tolerating a work environment in which a supervisor used epithets insulting to the national origin of the Complainant or by disciplining her more severely than non-Hispanics who committed equal or more severe offenses.

3. Whether the Respondent engaged in an illegal reprisal by terminating the Complainant's employment for complaining about the alleged sexual harassment or national origin discrimination noted above or complaining about alleged national origin discrimination against a co-worker.

Based upon all the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. On March 18, 1993, the Complainant filed a charge with the Minnesota Department of Human Rights (Department) alleging sex and national origin discrimination in employment. The charge was amended on June 24, 1993 to add a reprisal claim. The Department reached no determination of probable cause or no probable cause within 180 days of the filing of the amended charge and, on December 28, 1993, the Complainant's attorney requested a hearing before an Administrative Law Judge. Pursuant to Minn. Stat. § 363.071, subd. 1(a), the Commissioner of Human Rights forwarded the Complainant's request for hearing to the Office of Administrative Hearings on January 18, 1994.

2. The Complainant was born (a male) in Cuba on March 29, 1960 and immigrated to the United States in 1980. Her name at the time was Rene Bermudez, which still is her legal name. She has also been called "Lolita", a diminutive of the first name she now uses (Dolores). She lived in Columbus, Ohio and Chicago before moving to Minnesota in 1982. She began learning English in 1987 when she took a job washing dishes at an El Torito restaurant. She started her employment at Chi-Chi's in Richfield on August 18, 1988, and was employed primarily as a "cold prep" cook until her termination on December 26, 1992.

3. The Chi-Chi's in Richfield is a restaurant which, until October 25, 1992, was owned and operated by Consul Restaurant Corporation, a franchisee of Chi-Chi's, Inc. After October 25, 1992, Chi-Chi's, Inc. acquired the Chi-Chi's restaurants in Minnesota from its franchisee, which was in a bankruptcy proceeding in Minnesota.^[2] The personnel rules and policies of Consul remained in effect until January 1, 1993.

4. Gonzalez is a transsexual, which in medical terms is described as a gender identity disorder. Gonzalez has had her hips, legs, and breasts operated on to give her the appearance of a female. Gonzalez's genitalia remain that of a male.

5. Mr. Bruce Hyer, who was Respondent's Richfield Kitchen Manager from September 1992 through the end of Gonzalez's employment, was Gonzalez's immediate supervisor. Tr. p. 23, 36. As Kitchen Manager, Respondent gave Hyer the authority to hire and fire kitchen employees. Tr. p. 25; Exhibit 8 (position description).

Hyer was raised in Florida and graduated from Florida State University. Tr. p. 60. Living in Florida, he met a number of Hispanics and learned some Spanish words from Hispanics and non-Hispanics. He has never studied Spanish formally. Tr. p. 26-27.

6. Gonzalez was qualified for her position as a cold prep cook for the Respondent. She had over four years experience as a cold prep cook at that time she

was terminated. Tr. p. 75. In the summer of 1992, she was awarded a Best Employee award by the Respondent. Tr. p. 79-80. In mid-December of 1992, her manager called her a "valued employee." Tr. p. 46.

7. Gonzalez alleges that beginning in September, 1992 and continuing until the time of her termination in December, 1992, she was sexually harassed and subjected to harassment based on national origin by Hyer in the following manner:

- a. He touched her shoulders and breast and said "nice, pretty breast";
- b. He inserted a broomstick inside her anus;
- c. He touched her buttocks and said "nice butt"; and
- d. He said vulgar words in Spanish, including panocha grande, which to Gonzalez means "big pussy" or "big cunt", and verga, the equivalent of "dick";
- e. He grabbed his crotch area at various times while using the language noted in "d.", and asked her whether she liked to "suck verga".

Chi-Chi's had a written sexual harassment policy posted at the Richfield restaurant (Ex. 5). Gonzalez had read and understood the policy (T., p. 201-202). The policy directs victims to "promptly contact your immediate supervisor, your supervisor's supervisor, the Human Resources Department, or any appropriate Corporate Officer or Company representative". Gonzalez never contacted any such people, except allegedly Hyer.

8. Chi-Chi's restaurants are named after the wife of their founder. Her nickname is "Chi-Chi". Coincidentally, "chi chi's" means "tits" or "titties" in Mexican-Spanish slang. When pronounced "chee chée", however, the words mean the affectionate, gender-neutral diminutive "baby".

9. The Complainant was not sexually harassed by Bruce Hyer or any other employee or agent of Chi-Chi's during the course of her employment between August 18, 1988 and December 26, 1992.

10. Gonzalez also claims that she was discriminated against on the basis of national origin. First, she allegedly was not provided the same vacation benefits as other employees of different national origin. Her basis for this claim is that Emil Steinberg, a non-Hispanic dishwasher at Chi-Chi's, allegedly told her he was getting two weeks' vacation and she believed she had seniority equal to Emil's. She also believed she had a two-week vacation coming because her co-worker and companion Arturo Cuellar showed her a Chi-Chi's employment manual which indicated such entitlement for persons with her seniority.

11. Prior to January 1, 1993, the employee policies of Consul Restaurant Corporation applied to all employees of Chi-Chi's restaurants in Minnesota. That policy provided one week of paid vacation for all full-time employees, defined as employees who worked at least an average of 30 hours per week.

Chi-Chi's policy for full-time hourly employees as set forth in the Training Times provided two weeks of paid vacation for full-time hourly employees. Gonzalez was never covered by Chi-Chi's hourly employee policy because she was terminated prior to the effective date of that policy.

12. Gonzalez had no more vacation coming than she received for 1992 because she had not worked sufficient hours to earn more under the employment rules of Consul Restaurant Corporation, which still applied through December 31, 1992.

13. Gonzalez claims additional discrimination by the Respondent because of her national origin. She alleges Hyer frequently insulted her in Spanish, using the language noted at Finding 7d. and e. above, and claims further that the Employer is insensitive to Hispanics generally by maintaining the name "Chi-Chi's".

She alleges also that Hispanic employees were disciplined more severely than non-Hispanic employees and more severely than warranted. The Respondent allegedly failed even to the conduct an investigation before terminating Hispanic employees, while non-Hispanic employees received leniency in their discipline. For example, a Hispanic employee named Arturo Cuellar was terminated because a non-Hispanic employee claimed that he saw Cuellar take money from an employee's purse. The Respondent chose to believe the non-Hispanic employee. Cuellar was not believed even though Cuellar had allegedly never been criticized before for work-related problems. Cuellar was not given an opportunity to rebut this employee's accusation. Rather, he was immediately terminated. Tr. p. 273-75, 288-90.

As with Cuellar, Gonzalez maintains she was terminated immediately when she complained about the discrimination she was subjected to and was then accused of threatening a manager when making her complaint.

In contrast, a non-Hispanic employee who admitted an allegedly major violation of the work rules received only minor discipline. The Complainant maintains Hyer was only given a written warning when he allegedly physically assaulted a subordinate, in violation of Respondent's employee policy against "acts of violence," warranting immediate termination. See Ex. 3 and Ex. 18, p. 200190.

14. Gonzalez was not subject to discrimination because of her national origin. She only worked an average of 26 hours per week during the prior year, and did not qualify for vacation because she needed to average 30 hours per week. If any epithets were uttered by Bruce Hyer, they were not unwelcome to the Complainant. If they were, this was not known to Hyer or anyone else at Chi-Chi's until December 11, upon which date Hyer apologized for any misunderstanding. No later incidents of offensive language occurred. Neither Gonzalez nor other Hispanic employees received discipline out of proportion to the severity of their offenses compared to non-Hispanics.

15. On December 11, 1992, Gonzalez failed to follow the instructions given to her by one of her supervisors, Patty Klein. As a result of that insubordination, Hyer brought Gonzalez into his office together with other managers and explained to her that if she did not comply with the directions of her immediate supervisors (Hyer, Klein and Greg McCormick) she could be terminated. Hyer brought in other managers so that he

would have witnesses to his having warned Gonzalez. Gonzalez was humiliated and angered by this incident.

16. After that meeting, Gonzalez purchased a tape recorder and, on the following morning, December 12, 1992, requested to speak with Hyer. Gonzalez surreptitiously recorded her conversation with Hyer.

The tape (Ex. 28) reveals no admission by Hyer to any act of sexual harassment. The tape is largely inaudible, but intelligible portions survive that, taken out of context, can be construed to support an allegation that Gonzalez accused Hyer of sexual harassment. His specific response to such accusations, if any, is inaudible. When Gonzalez brought up vacation entitlement, Hyer referred her to the restaurant's general manager and office manager. She accused him of "playing with her", and Hyer is heard to apologize for any "misunderstanding" and promises not to do it again. It is unclear whether the "playing" referred to is physical play or joking and teasing, and it is unclear whether the "play" was sexual, or related to national origin or was devoid of discriminatory implication. Hyer is heard to deny any alleged discrimination, and he refers Gonzalez to management to resolve any complaints she has.

17. On December 22, 1992, Gonzalez accompanied her "husband" Arturo Cuellar ("Cuellar") to the Chi-Chi's City Center restaurant where Cuellar had been an employee. Cuellar had been terminated by Chi-Chi's a few days earlier because of a theft by Cuellar witnessed by other employees. Gonzalez accompanied Cuellar to the City Center Chi-Chi's restaurant ostensibly to assist him in translation of English, as Cuellar allegedly was not as fluent in English as Gonzalez.

Roger Laux ("Laux") was the general manager of the Chi-Chi's City Center restaurant and the person with whom Gonzalez and Cuellar met. During that meeting, Gonzalez alleged that Cuellar had not been terminated because of the theft that other employees had witnessed but, instead, because of his national origin. In addition, Gonzalez then told Laux that she was the victim of discrimination because of Chi-Chi's failure to pay her vacation benefits and workers' compensation benefits^[3], and that she had been sexually harassed by a manager at the Richfield restaurant. Gonzalez did not identify the manager who had allegedly harassed her.

Laux told Gonzalez to bring her discrimination complaints to the management at Richfield, where she worked.

18. At the conclusion of her conversation with Laux, Gonzalez revealed that she had been secretly tape recording the meeting, threatened Laux with the claim that she now had evidence of discrimination by Chi-Chi's and that she would be going to the media and an attorney with this evidence.

19. Before leaving the City Center restaurant, Gonzalez confronted Christopher Lundgren ("Lundgren"), the kitchen manager at the City Center restaurant. During the discussion between Gonzalez and Lundgren, Gonzalez became increasingly louder, agitated and threatening. Her encounter with Lundgren concluded when Gonzalez, speaking into her tape recorder, stated to Lundgren words to the effect "what are you going to do, push me?", attempting to create the false impression that Lundgren was about to assault her physically.

The confrontation between Gonzalez and Lundgren was in full view of the customers in the dining facility at that restaurant and created a noticeable disturbance. The receptionist called building security to assist in the removal of Gonzalez and Cuellar from the restaurant. Immediately after this disturbance, Lundgren informed Laux of the incident.

20. The tape of the conversations with Laux and Lundgren also is largely inaudible. It reveals Laux referring Gonzalez to her restaurant's management regarding any charges or claims of discrimination she had. It also reveals her informing Laux of her having made the tape and what she intended to do with it. The conversation with Lundgren reveals Gonzalez's challenging him to throw her out and his sarcastic reply of "Oh yeah, yeah, there you go. I'll push you . . ." (Ex. 29A, line 482). When Lundgren informed Laux of the incident at the entrance, he was visibly upset and physically trembling.

21. Laux then called Margot McManus ("McManus"), Consul Corporation's Director of Human Resources, at her home to report the incident with Gonzalez. The primary reason for the call was the disturbance created by Gonzalez at the City Center restaurant. In that conversation, Laux also informed McManus of Gonzalez's other allegations.

McManus then consulted with Keith Streitenberg, the director of operations, Bruce Good, one of the district managers, and Gary Kannenberg, another district manager. As a result of those discussions, it was concluded by the Employer that Gonzalez should be terminated for her conduct at the Chi-Chi's City Center restaurant. Gonzalez's allegations of sexual harassment were not discussed in the decision to terminate Gonzalez and were not a factor in that decision.

Hyer was on vacation at the time of the termination and was not consulted about the decision to terminate Gonzalez. Richfield general manger Bob Schmidt was consulted, although he also was on vacation.

22. At the time of her termination, Gonzalez was earning \$8.60 per hour.

Gonzalez did not attempt to obtain employment for approximately seven months after her termination. Gonzalez obtained employment at a Perkins restaurant in August, 1993, at an hourly salary of \$7.25. Gonzalez voluntarily left the employ of Perkins after one day of employment.

Gonzalez subsequently was employed by Goodfellow's restaurant in 1993 and then returned to employment at the Perkins restaurant later in 1993. At the end of February, 1993, Gonzalez was involuntarily terminated by Perkins.

23. During the time between Gonzalez's termination from Chi-Chi's and her first employment with Perkins in August, 1993, Gonzalez received \$3707 in unemployment compensation benefits.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. The Administrative Law Judge has jurisdiction in this matter pursuant to Minn. Stat. §§ 14.50 and 363.071.

2. Any of the foregoing Findings of Fact more appropriately termed Conclusions of Law are hereby adopted as such.

3. Chi-Chi's Restaurant is an employer as defined in Minn. Stat. § 363.01, subd. 17 (1994).

4. Since Chi-Chi's, Inc. defended this action, it has waived any defense of insufficient process.

5. Gonzalez has failed to establish a prima facie case of sexual harassment because there is no credible evidence that Gonzalez was subjected to unwelcome sexual harassment.

6. Gonzalez has failed to establish a prima facie case of national origin discrimination.

7. Chi-Chi's, Inc. did not discriminate against Gonzalez on the basis of national origin, as there is no competent evidence to support the theory that she was entitled to two weeks vacation pay while an employee of Consul Restaurant Corporation.

8. Chi-Chi's, Inc. did not discriminate against Gonzalez on the basis of national origin because there is no competent evidence that the Respondent tolerated the use of epithets offensive to Cubans directed to her. Even if it did, the alleged perpetrator apologized immediately after the offensiveness to Gonzalez was brought to his attention and ceased any further use of the alleged offensive language.

9. Chi-Chi's did not discriminate against Gonzalez based on national origin because there is no competent evidence that it disciplined her or any other Hispanic employees in a manner disproportionate to the severity of the offense compared to discipline rendered to non-Hispanic employees.

10. Gonzalez has failed to prove a prima facie case of reprisal under the Minnesota Human Rights Act.

11. Chi-Chi's has stated a legitimate, non-discriminatory reason for terminating Gonzalez's employment.

12. Gonzalez has failed to produce any evidence suggesting the enunciated reason for her termination is a pretext.

13. The reasons for the above Conclusions of Law are set out in the Memorandum which follows. The Memorandum is incorporated into these Conclusions of Law by reference.

Based upon the foregoing Conclusions of Law, the Administrative Law Judge makes the following:

ORDER

IT IS ORDERED: that the Charge, Amended Charge, and Complaint in this matter are DISMISSED, WITH PREJUDICE.

Dated this 7th day of April, 1995

RICHARD C. LUIS

Administrative Law Judge

Reported: Janet Shaddix Elling & Colleen M. Sichko
Janet Shaddix & Associates
Transcript Prepared

MEMORANDUM

The Complainant alleges that she was sexually harassed by her supervisor in violation of Minn. Stat. § 363.03, subd. 1(2)(c). The Minnesota Human Rights Act makes it an unfair employment practice for an employer, because of sex, “to discriminate against a person with respect to hiring, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment.” For purposes of the statute, discrimination based on sex includes sexual harassment, which is defined at Minn. Stat. § 363.01, subd. 41 as follows:

“Sexual harassment” includes unwelcome sexual advances, requests for sexual favors, sexually motivated physical contact or other verbal or physical conduct or communication of a sexual nature when:

* * *

(3) that conduct or communication has the purpose or effect of substantially interfering with an individual’s employment * * * or creating an intimidating, hostile, or offensive employment * * * environment; and in the case of employment, the employer knows or should know of the existence of the harassment and fails to take timely and appropriate action.

Analysis of discrimination charges under the Minnesota Human Rights Act (MHRA) involves three steps. Those steps were first articulated in McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973). The Minnesota Supreme Court has adopted the three-part McDonnell-Douglas test. Sigurdson v. Isanti County, 386 N.W.2d 715, 720 (Minn. 1986). The three-part test consists of a prima facie case, an answer, and a rebuttal. The complainant is required to establish a prima facie showing of discrimination which, if not explained, raises an inference of discrimination. If a prima facie case of discrimination is established, the employer must articulate a legitimate nondiscriminatory reason for its action or otherwise rebut the prima facie case. Once the employer does so, the burden of going forward with the evidence reverts to the complainant, who must present evidence of pretext or otherwise show that the employer’s rebuttal is not worthy of belief. At all times, the burden of proof remains with the complainant. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089 (1981).

In order to establish a prima facie case of sexual harassment, the complainant must show:

- (1) The employee belongs to a protected group.
- (2) The employee was subject to unwelcome sexual harassment.
- (3) The harassment complained of was based on sex.
- (4) The harassment complained of affected a “term, condition, or privilege” of employment.

- (5) The employer is liable for the harassment that occurred based on its actual or imputed knowledge of the harassment and its failure to take appropriate remedial action.

Klink v. Ramsey County, 397 N.W.2d 894, 901 (Minn. App. 1986); Bersie v. Zycad Corporation, 417 N.W.2d 288, 290 (Minn. App. 1987); Evans v. Ford Motor Co., 768 F.Supp. 1318 (D. Minn. 1991).

The Employer contends that because Gonzalez is transsexual, and biologically still a male, she is not a member of a protected group (the first element of proof noted above), and that the alleged harassment was not based on sex (the third element). The Administrative Law Judge disagrees with this argument, but the meeting of those elements by the Complainant is immaterial in any case.

Elements (4) and (5) are satisfied if the alleged harassment occurred. If Bruce Hyer committed the acts alleged by Gonzalez, the harassment created a hostile, intimidating and offensive working environment for her. And, because Hyer was a supervisor, his knowledge of having committed the harassment is imputed (arguably) to the employer. Even if such imputation is inappropriate legally, Gonzalez complained to a general manager (Laux), and this complaint was passed on to managerial personnel before Gonzalez was fired. Therefore, it is concluded that Chi-Chi's knew or should have know of the existence of any harassment. See Giuliani v. Stuart Corp., 512 N.W.2d 589, 595 (Minn. App. 1994)

However, the Complainant must satisfy all of the above-listed elements of proof in order to establish a prima facie case of sexual harassment, and she has not established element (2)—that she was subject to unwelcome sexual harassment. The Administrative Law Judge does not believe that Hyer harassed Gonzalez sexually in violation of Minnesota law.

Gonzalez's allegations of sexual harassment against Hyer are not credible for the following reasons:

- a. The tape recording of December 12, 1992 does not support Gonzalez's testimony regarding her recollection of the allegations that she made in that conversation;
- b. During the December 12, 1992 meeting between Hyer and Gonzalez, Hyer directed Gonzalez to see Janet, the office manager, or Bob Schmidt, the store manager, with any claims of discrimination that she might have;
- c. Gonzalez's allegation that an incident occurred in which Hyer allegedly inserted a broom in her anus is inherently incredible and, furthermore, her description of the incident has changed so substantially in different versions of the story to make the story not credible;
- d. The testimony of Michael Boland, the kitchen manager at the Richfield Chi-Chi's restaurant prior to Hyer, regarding

Gonzalez's conduct is credible and casts doubt on the veracity of all of Gonzalez's testimony;

- e. Both Boland and Hyer were credible in their testimony, which was not rebutted or challenged, that Gonzalez "threatened" to sue Chi-Chi's for discrimination constantly, to the degree that it became "normal conversation" for her, especially when she got upset, which was a frequent occurrence;
- f. Gonzalez's failure to inform her other immediate supervisors, McCormick and Klein, about the alleged sexual harassment undermines her credibility, particularly since Gonzalez allegedly mentioned to Klein her accusation of discrimination based on the vacation policy;
- g. Gonzalez's evasiveness and inaccuracies regarding prior conduct such as her dancing activities and charges of welfare fraud, undermine her credibility;
- h. The psychological assessment of Gonzalez by Dr. William Grove supports the finding that Gonzalez would deliberately provide false statements; and
- i. Jose Nunez testified that he saw Hyer put a broom "in the ass" of Gonzalez, and corroborated Gonzalez's testimony regarding Hyer's use of Spanish epithets and putting his hand in the crotch of his pants. The ALJ does not find Nunez's testimony to be credible.

Credible testimony does not support Gonzalez's claim that she was subjected to unwelcome sexual harassment. The major portions of testimony involving this issue are discussed below.

a.) The December 12 tape.

A key piece of evidence for the Complainant is the tape recording, or the transcript of the tape recording, of the December 12, 1992 meeting between Gonzalez and Hyer. (Exs. 28 and 28A). Gonzalez's testimony regarding that conversation includes the following:

I say you remember when you talk to me if I like to suck a dick, panache grande, he touching my breasts, sometime, many time he call me you dumb bitch or something like that . . .

* * * *

. . . and he say he not going to do no more about suck a dick, panache grande, touching my butt, touching my breasts, put a broom between my - - both legs, in the back of the ass and all this stuff.

(T. 114, l. 9-13 and l. 20-24).

Not one word of Gonzalez's testimony quoted above appears in any transcript of the recording. The most plausible explanation for this omission is that none of these words were ever spoken. The audible portions of the tape recording are in contrast to the alleged graphic conversation that Gonzalez described in her sworn testimony.

The tape recording was made by Gonzalez at a time when she thought she was on the verge of being fired for insubordination, as a result of her conduct the previous evening. (T. 190, l. 6-11; T. 500, l. 21 - T. 501, l. 5). Hyer made it clear that she was welcome to stay as long as she did what her manager told her to do. (Ex. 28A at 270, 571, and 604). Indeed, it appears that Hyer did everything he could to placate Gonzalez's fear of being fired as a result of the insubordination incident the previous evening. (T. 500, l. 1-20).

Gonzalez did complain about discrimination (based on national origin) at that meeting, (Ex. 28A at 424). Hyer responded that she should contact "Janet the new office manager" or "talk to Bob" (Schmidt, the general manager). (Ex. 28A at 448). This is hardly the advice that a harasser would give to an employee who had just made the allegations that Gonzalez testified were made in that meeting. Rather, it is the response of a supervisor who is trying to provide satisfactory answers to the employee's concerns.^[4] It cannot be said that the tape recording supports Gonzalez's testimony in any meaningful way.

b.) The broom incident.

Gonzalez provided considerable detail in her Initial Charge about the incident in which she claimed Hyer inserted a broom in her anus. In relevant part, her statement accompanying the Charge reads "he was behind me and with the point of a broom he put the broom within my anus like four fingers in me . . ." (Resp. Ex. 52). The allegation was repeated in her testimony at trial. (T. 101, l. 1-22).

This story lacks credibility for a number of reasons. First, it would be nearly physically impossible to insert a broom within Gonzalez's anus given the fact that Gonzalez was wearing pants at the time. (T. 101, l. 16-19). Next, one must ask the logical question of how likely it is that a manager, who was familiar with Chi-Chi's policy against sexual harassment and who had been involved in the termination of Chi-Chi's employees who had sexually harassed other employees, would ever commit such an act at all, let alone in the presence of other employees, as Gonzalez testified. (T. 102, l. 4-10; T. 495, l. 10 - T. 496, l. 18; T. 581, l. 8-10).

In addition to the near physical impossibility of the incident as well as its improbability, the story has different versions. In Gonzalez's description of the incident to her own expert witness, Sonia Carbonell ("Carbonell"), Gonzalez implied that the broom penetrated her vagina. (T. 700, l. 8-13; T. 700, l. 24 - T. 701, l. 2; Resp. Ex. 66, p. 9; Resp. Ex. 69, p. 3).^[5] In her description to Chi-Chi's expert, Dr. William M. Grove ("Grove"), the incident is described more as a "goosing," with no penetration whatsoever. (T. 925, l. 1-22; Resp. Ex. 69, p. 3). The fact that Gonzalez herself has offered different and inconsistent versions of the alleged broom incident is further

evidence of the improbability that the incident ever occurred in any fashion. The ALJ concludes that if ever such an incident occurred as alleged by Gonzalez in her Charge, one would not soon forget the details, and the story would not vary as this one has varied. The alleged broom incident undermines Gonzalez's credibility.

c.) Michael Boland ("Boland") testimony.

Boland was the kitchen manager at the Chi-Chi's Richfield restaurant from late spring 1992 until August 1992, when Hyer was transferred to that position. (T. 300, l. 16 - T. 301, l. 7). During that period of time, Boland was Gonzalez's supervisor. (T. 302, l. 7-10).

Prior to the time that Boland was kitchen manager at Chi-Chi's, he had attended the University of Minnesota, obtained three associate of science degrees; attended the Hotel Sofitel School of French Culinary Art for a year; worked at a French restaurant starting as a wine cook and ending as a chef; been executive chef at La Tortue, Nigell's, and the Minneapolis Athletic Club; worked for General Mills as the manager of an Olive Garden restaurant; been promoted to general manager there where, among other duties, he trained 26 other managers; and worked as a district manager for Jose's Restaurants. (T. 296, l. 7 - T. 299, l. 12).

Boland's testimony regarding Gonzalez included the following: "she was extremely defensive and quite aggressive . . ." (T. 303, l. 10-11); she threatened to sue Chi-Chi's many times . . . "as much as once a shift and sometimes more." (T. 303, l. 16-19); she would use a statement that "we're discriminating against her, continuously, habitually . . ." (T. 303, l. 22-24); she was not flexible for scheduling purposes, particularly on Sunday nights (T. 304, l. 15 - T. 305, l. 4); she had to be warned against sexual harassment of other employees (T. 305, l. 7 - T. 306, l. 2); and he (Boland) witnessed many incidents when she would say "Hey, baby, you got a cute ass," and "Hey, sweetheart, what are you doing this Sunday night . . ." (T. 306, l. 3-15).

In addition, Boland remarked several times during his testimony about Gonzalez's aggressiveness. (T. 303, l. 11; T. 311, l. 8; T. 311, l. 11; T. 311, l. 23). This description of Gonzalez varied considerably from Gonzalez's numerous references to herself as "so shy" (T. 102, l. 4), but coincides with Gonzalez's own expert's evaluation of Gonzalez's personality as assertive. (T. 692, l. 1-6).

Boland also testified that he never witnessed Hyer harassing any employee nor even heard of such an allegation against Hyer while he (Boland) worked there. (T. 315, l. 5-12).

Boland voluntarily left the employment of Consul Restaurant Corporation, the largest franchisee of Chi-Chi's and the owner and operator of the Richfield Chi-Chi's restaurant until October, 1992, to take over a family business started by his father. (T. 313, l. 10 - T. 314, l. 1-5). Leaving that position, Boland turned down a promotion to the general manager position at the Richfield restaurant. (T. 321, l. 10-11).

On redirect examination, Gonzalez categorically denied nearly every part of Boland's testimony. (T. 587, l. 8 - T. 595, l. 15). She offered her own opinion that Boland was lying. (T. 587, l. 2-3). Given the extremes of the testimony, it is clear that either Gonzalez or Boland lied under oath. The ALJ sees no reason for Boland, as a

former Consul Restaurant Corporation employee who turned down a promotion and left that organization voluntarily, to lie on behalf of Chi-Chi's. His demeanor did not suggest that he was uncomfortable with his testimony. In fact, his demeanor was extraordinarily forthright, and one was left with the distinct impression of a very independent and self-reliant person, hardly the type of person who would commit perjury. On the other hand, Gonzalez's motivation for contradicting Boland's damaging testimony is self-evident.

d.) Margot McManus ("McManus") testimony.

McManus was the Director of Human Resources for Consul at the time of the alleged incidents and at the time of Gonzalez's termination. (T. 334, l. 5-7). She had been an employee of Consul Restaurant Corporation, the franchisee of Chi-Chi's, from 1980 until October, 1992, and then continued to work for Chi-Chi's from the time of its acquisition of Consul Restaurant Corporation's operations in that month until March 1993. (T. 333, l. 3-13; T. 349, l. 14-16).

McManus testified that Gonzalez applied for workers' compensation as a result of a fall at the Richfield restaurant, that her claim for workers' compensation benefits was denied by the insurance carrier, and that Gonzalez's hospital bills were paid in connection with that incident. (T. 357, l. 22 - T. 358, l. 9).

McManus, along with Patty Klein, conducted Gonzalez's termination or exit interview on December 26, 1992. (T. 357, l. 5-7; Comp. Ex. 9). McManus testified that Gonzalez did not complain to her (McManus) about sexual harassment or national origin discrimination at the time of that exit interview. (T. 357, l. 16-21). Further, McManus testified that she did not even hear that Hyer was the subject of any sexual harassment allegation by Gonzalez until after Gonzalez's termination. (T. 359, l. 20-22).

Once again, Gonzalez's testimony is directly opposite from McManus's testimony. Gonzalez testified that she never applied for workers' compensation benefits. (T. 210, l. 17 - T. 211, l. 1). Gonzalez testified that she claimed at her termination interview that her termination was a result of discrimination and that Hyer had sexually harassed her. (T. 151, l. 4-10; T. 217, l. 23 - T. 218, l. 19). Both of these versions of the termination interview cannot be true. Once again, McManus has no motivation to perjure herself on behalf of Chi-Chi's. Given the fact that another manager, Klein, was present at the termination interview, it would seem implausible for McManus to lie about what was said at that interview. The termination form even has a pre-printed space for "Employee Statement." (Comp. Ex. 9). Nothing was placed in that space except a notation by Klein that Gonzalez refused to sign the form. It defies common sense to believe that McManus, after years of experience in human resources, would simply ignore the allegations that Gonzalez now claims that she made at that interview. Finally, as with Boland, McManus's demeanor certainly left one with the impression that she was comfortable with her testimony.

e.) Gonzalez's prior conduct.

In 1992 the Hennepin County Attorney's Office charged Gonzalez with two counts of wrongfully obtaining public assistance. (T. 206, l. 7-22; Resp. Ex. 53). She was diverted to Operation De Novo and ordered to pay restitution in the amount of \$4,528.00. Her recollection of the amount that she had paid back at the time of the

hearing differed considerably from the amount that she had actually paid back. Gonzalez testified that she had made payments totaling \$2,000. (T. 224, l. 13-17). In fact, her payments total \$600 (Ex. 53; Official Notice by Administrative Law Judge, 3/8/95).

f.) Bruce Hyer ("Hyer") testimony.

Hyer denied the allegations made by Gonzalez, both in his testimony at the hearing (T. 501, l. 23 - T. 503, l. 9) and at the time of Chi-Chi's internal investigation in the spring of 1993 (Resp. Ex. 57, Bates Stamp 200353). Interestingly, in the letter provided to Chi-Chi's in April, 1993, Hyer wrote that he would not say the things he is alleged to have said to any employee "much less to an employee that every time a manager corrects her, she would talk about discrimination and getting her lawyer." (Resp. Ex. 57, Bates Stamp 200353).

Hyer's observation is interesting for several reasons. First, his denial is supported by every statement Chi-Chi's obtained in the course of its internal investigation. (Resp. Ex. 57, Bates Stamp 200349 -200359). Next, Hyer's comments are remarkably similar to his statement to Gonzalez on December 12, 1992 that he did not want her (Gonzalez) to come to him "every time we get mad at each other and saying its discrimination and that I'm harassing you." (Ex. 28A at approximately 495 - 505). Finally, his comment regarding claims of discrimination are also similar to Boland's observations about Gonzalez (T. 303, l. 16-19) as well as Hyer's own testimony at trial that "[E]very time something didn't go her way she talked about suing" (T. 497, l. 20-21).

Hyer also testified that he was familiar with Chi-Chi's policy against sexual harassment and, indeed, was directly involved in the termination of employees who had sexually harassed other employees. (T. 495, l. 17 - T. 496, l. 18). Given that knowledge and responsibility, it seems unlikely, if not incredible, that Hyer would say or do what Gonzalez has alleged.

In the December 12, 1992, tape recorded meeting, Hyer directed Gonzalez to go to Janet, the office manager, and Bob, the general manager, with her concerns. (Comp. Ex. 28A at 448). This direction, as previously noted, is hardly consistent with what one would reasonably expect from a person who had just been accused of sexual harassment, as Gonzalez claims she accused Hyer in that conversation.

Gonzalez testified that Hyer said *panocha grande* to her. (T. 90, l. 9-17). It seems unlikely, however, that Hyer would have stated those words to her because, among other reasons, Hyer knew that Gonzalez did not have a vagina and that the sex change procedure had not yet been completed. (T. 518, l. 20-24).

Hyer's description of Gonzalez is strikingly similar to Boland's observation of an aggressive, assertive employee who threatened to sue her employer for every perceived injustice and who had to be cautioned about her harassment of other employees. These descriptions, in part, are confirmed by Gonzalez's conduct at the City Center restaurant in which she provoked a disturbance and became belligerent with Chris Lundgren, the kitchen manager at that restaurant. The observations of Boland and Hyer, together with the City Center incident, confirm Hyer's impression that even if it

is assumed that Hyer was inclined to engage in harassing conduct in the workplace—and there is no credible evidence to support that assumption—Gonzalez is not an employee that would be targeted for such conduct.

g.) Gonzalez's psychological assessments.

Gonzalez underwent two psychological assessments, one by her expert, Sonia Carbonell, and the other by Chi-Chi's expert, Dr. William M. Grove ("Grove"). The results of those assessments cast further doubt on Gonzalez's credibility. Mention has previously been made of the divergent stories Gonzalez offered to Carbonell and Dr. Grove regarding the broom incident.

One of the more significant aspects of the psychological assessments is Gonzalez's score on the Minnesota Multiphasic Personality Inventory-2 (MMPI-2) given to her by Carbonell. Particularly, Gonzalez's score on the F scale is most telling. (Resp. Ex. 64, p. 4). The meaning of that score on the F scale was the subject of considerable testimony by both Carbonell and Dr. Grove. Carbonell essentially dismissed all results from the MMPI-2, citing reading comprehension and cultural differences as the explanation for "an uninterpretable profile." (Comp. Ex. 41, p. 2; T. 659, l. 25 - T. 660, l. 3). Significantly, however, Carbonell admitted on cross-examination that Gonzalez's F scale score was "extremely elevated" and that such a score is consistent with a finding of exaggeration, faking of psychological problems and malingering. (T. 685, l. 11 - T. 686, l. 2).

Dr. Grove's interpretation of Gonzalez's MMPI-2 scores was significantly different from Carbonell's. While agreeing that the F scale score was extremely high, Dr. Grove did not agree that cultural differences or reading difficulties were likely explanations for the high F scale score. (Resp. Ex. 69, pp. 3-4). Dr. Grove elaborated in his testimony, stating that:

"It is simply not the case that there is nothing that can be made out of an MMPI-2 given this high F scale. In fact, you can ask the question why the F scale is so high in an attempt to arrive at an understanding at why it may be so high."

(T. 886, l. 21-25).

Dr. Grove further testified that the TRIN and VRIN scores on the MMPI-2 need to be examined in the context of a high F scale score to attempt to determine the reason for the elevated F score. (T. 887, l. 18-24). Having examined the VRIN and TRIN scores, Dr. Grove concluded that Gonzalez's elevated F score indicates strong exaggeration of psychological problems or outright malingering. (T. 904, l. 5-10).^[6]

Dr. Grove reached his opinion on the following basis. First, he testified that Gonzalez does not have an organic brain disorder or any psychiatric disorder. (T. 904, l. 12-22). Further, Dr. Grove testified that given Gonzalez's Hispanic or Latin American origin, the cultural differences would not account for the extremely elevated F score. (T. 900, l. 16-20; T. 904, l. 23-24). To support that opinion, Dr. Grove cited data indicating that a small increase, in the range of a few points, in the F scale score can be expected

for individuals from a Hispanic culture. (T. 901, l. 2-6; T. 891, l. 19-22). The increase in Gonzalez's score on the F scale is not a matter of a few points but rather seven standard deviations above the mean. (T. 891, l. 8-10).

Dr. Grove further testified that, given Gonzalez's VRIN score and her educational background, reading comprehension does not account for Gonzalez's high F score. (T. 904, l. 25 - T. 905, l. 5).⁷ Dr. Grove next ruled out carelessness as a possible cause for the elevated F score because Gonzalez's TRIN and VRIN scores on the test are inconsistent with such a theory. (T. 905, l. 6-8). Dr. Grove concluded, therefore, that "[A]bout all you've got left is some type of exaggerating or malingering." (T. 905, l. 9-10). Dr. Grove further testified that studies with which he is familiar indicate that the MMPI-2 is 85 to 95 percent accurate in detecting malingering. (T. 908, l. 11-19).

Dr. Grove received his Ph.D. in clinical psychology from the University of Minnesota in 1983. (T. 853, l. 4-6). Since that time, he served as a research scientist with the University of Iowa and the Department of Psychiatry for one year; spent five years as a faculty member in the Department of Psychiatry at the University of Minnesota Medical School; and since 1990 has been an associate professor at the Department of Psychology at the University of Minnesota. (T. 853, l. 16 - T. 854, l. 1). Dr. Grove testified about his extensive experience, including the training he received in administering the MMPI from the acknowledged experts in that field. (T. 852, l. 10-16; T. 885, l. 7-20). In light of Dr. Grove's education, training, and experience, his testimony has been accorded more weight than the testimony offered by Carbonell.

Given the numerous inconsistencies in the testimony between Gonzalez and those who have nothing to gain by lying, Gonzalez's varying versions of the alleged broom incident, Gonzalez's past conduct as it relates to welfare fraud, and Dr. Grove's professional opinion that Gonzalez was deliberately faking psychological problems, Gonzalez's testimony regarding the alleged incidents of sexual harassment is not accepted by the ALJ as credible.

The Judge did not believe José Nunez's testimony to the effect he saw Hyer put a broom "in the ass" of Gonzalez, that he saw Hyer place his hand in his crotch and taunt Gonzalez, or that he heard Hyer use derogatory Spanish epithets toward her. (T. 628). He also testified to having told Hyer and Schmidt of these observations. (T. 632). Apart from Gonzalez, Nunez is the only witness who testified to any harassment by Hyer.

Nunez's testimony is not credible. Nunez was nervous and evasive in answering questions. Hyer and Schmidt appeared to the ALJ as the more believable witnesses. Nunez denied dancing with Dolores or that he had ever told anyone at Chi-Chi's that Gonzalez's allegations were untrue. (T. 633). The ALJ believes the testimony of Bob Schmidt, general manager at Richfield, that Nunez told him and Hyer sometime in the spring of 1993 that Gonzalez's claim was "nonsense." Schmidt also contradicted Nunez credibly by testifying that José was proud to be a dance partner for Gonzalez, and that he used to bring pictures to work showing them in dance costumes.

The Minnesota Human Rights Act forbids discrimination based on national origin. Minn. Stat. § 363.03, subd. 1(2)(b) and (c) provide, in relevant part:

. . . it is an unfair employment practice:

(2) For an employer, because of . . . national origin . . .

(b) to discharge an employee; or

(c) to discriminate against a person with respect to hiring, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment..

In order to establish a prima facie case of discrimination based on national origin, the Complainant must show (1) that she belongs to a protected group, (2) she was qualified for the job and (3) she was treated differently than persons of other national origin with respect to a term or condition of employment. See also, Kovalesky v. West Publishing Co., 674 F.Supp. 1379 (D.Minn. 1987).

Gonzalez satisfies elements (1) and (2) above, but has not established disparate treatment. Therefore, her claim of discrimination based on national origin has been dismissed.

In her charges and Complaint, Gonzalez alleged she received less vacation than that to which she was entitled, compared to that received by a non-Hispanic employee otherwise situated similarly in terms of seniority and entitlement. It is understood that Gonzalez's belief in this regard, although misplaced (it is now undisputed that she did not work the requisite number of hours) was genuine. She also complained about the alleged unequal treatment regarding vacation entitlement to management. The Employer's alleged reprisal for her having made that complaint (and other discrimination claims) is the subject of another charge in this case (discussed later). Testimony on the vacation issue was developed at the hearing.

At the hearing, testimony was also developed by the Complainant to establish two other strands of alleged unequal treatment based on national origin—that she was subjected to obscene epithets “against her national origin” and that she was discharged (and thus subject to more severe discipline) for an offense less severe than those committed by non-Hispanic employees who were not fired for their offenses. She supports these theories partially with evidence showing that another Hispanic, Arturo Cuellar, also allegedly received unduly severe discipline (discharge) compared to non-Hispanic employees.

Formal, written “notice” that Gonzalez was basing her claim of national origin discrimination on something other than disparate treatment regarding vacation pay appears for the first time in the Initial Brief of the Complainant. In its Reply, the Employer notes this but makes no motion to dismiss this portion of the charges.

The Administrative Law Judge has dealt with the merits of the claims of national origin discrimination based on the allegedly offensive epithets and disparate discipline and concludes that they, too, should be dismissed. Gonzalez is unable to establish by credible evidence that she, or other Hispanic people, were disciplined in a manner disproportionate to their offenses when compared to non-Hispanics or that the alleged offensive language occurred.

Regarding the alleged epithets, one item cited is the Employer's name—Chi-Chi's, which is one name in "Mexican Spanish" for "tits" or "titties". If Gonzalez were offended by the Employer's name, she could have refused to accept the job or quit any time. There is no evidence the Complainant called the Employer's attention to the fact that she was offended by the company name at any time. Therefore, she has acquiesced to the alleged offense. The fact that the Employer is named "Chi-Chi's" cannot serve as a basis for a Human Rights Act violation in this instance.

The other instance of allegedly offensive language used as a basis for national origin discrimination was Hyer's calling Gonzalez a "panocha", which means "cunt" or "pussy" in Mexican slang. The ALJ believes the word would be offensive to Gonzalez, but he is not persuaded by the evidence that the word was used by Hyer with reference to her. If he used the word "panocha", it was to joke. Although the evidence does not establish specifically that Gonzalez told Hyer on December 12, 1992 she was offended by the use of the word, it is noted that Hyer apologized to her on that date, that he promised not to "offend" her in the future and the record contains no evidence of subsequent problems with Hyer for the remaining two weeks of the Complainant's employment.

Hyer alleges he would not use the language Gonzalez alleges he used to demean someone based on their nationality. For the reasons stated above for dismissal of the sexual harassment charge, the ALJ does not believe Gonzalez and believes Hyer regarding the issue of offensive epithets.

With respect to the assertion that Hispanics (Gonzalez, Cuellar) are disciplined out of proportion to their alleged offenses, compared to non-Hispanics, the Complainant compares termination for loud, threatening behavior (Gonzalez) and termination for theft from a co-employee (Cuellar) to Hyer's having received a written reprimand for an alleged "assault" or "act of violence". Also argued is that Gonzalez committed no violation of the Employer's written work rules, whereas Hyer could have been fired for having violated a written rule. It is noted that Gonzalez uses the Cuellar incident as another potential basis of her reprisal charge—that she was fired for having called to Chi-Chi's attention that Cuellar was not given a chance to defend himself because he was Mexican. That charge is discussed subsequently.

The Administrative Law Judge concludes that Gonzalez's belatedly-raised charges regarding disparities in discipline are without merit. The Complainant's suggestion that Chi-Chi's lacked valid, non-discriminatory reasons for terminating Cuellar and Gonzalez simply ignores the evidence presented here. Cuellar was terminated for theft which was witnessed by two other employees. (T. 460, I. 19-24; T. 462, I. 5). Gonzalez's termination resulted from the disturbance that she created at the City Center restaurant in the presence of customers. As McManus testified, Gonzalez was terminated pursuant to the Rules and Conduct section of the Consul Hourly Employee Handbook. (Comp. Ex. 1 at Bates Stamp 200026). That section provides in part that employees must conduct themselves "in such a way as to create a favorable impression of your restaurant and the company to our customers." In addition, McManus made it clear, as does the document, that the list of offenses was not exhaustive. (T. 379, I. 21-25). The Complainant, however, argues that the termination

was not in compliance with Chi-Chi's Hourly Employee Work Policy as set forth in Chi-Chi's Management Operations Manual. (Comp. Ex. 3 at Bates Stamp 200433). That argument is misplaced. There is a distinction between Consul Restaurant Corporation and Chi-Chi's, Inc. The employee policies of Consul Restaurant Corporation, not those of Chi-Chi's, governed hourly employees at these restaurants until January 1, 1993.

The Complainant supports her national origin discrimination claim further by arguing that Hyer committed an "act of violence," yet was not terminated. That argument fails for two reasons. First, it is clear that the physical contact Hyer had with another employee was not an act of violence. (Comp. Ex. 18 at Bates Stamp 200190; T. 56, l. 14-17). Second, there is no evidence to suggest that Hyer would not have been terminated if he had been caught stealing or if he had confronted another manager at another restaurant and caused a disruption of that restaurant's business. Hyer was disciplined appropriately for his conduct just as Cuellar and Gonzalez were disciplined appropriately for their more egregious conduct. There is no evidence to suggest that non-Cuban or non-Hispanic employees are not terminated for theft or for disrupting the business of other restaurants. No claim of discrimination based on national origin can be sustained on these facts.

The Complainant alleges she was a victim of reprisal because she was terminated in response to her having brought discrimination against herself and Cuellar to the attention of the Employer. The Administrative Law Judge does not agree, and the reprisal complaint has been dismissed.

Minn. Stat. § 363.03, Subd. 7(1) makes it illegal for an employer to retaliate against an employee for opposing a practice forbidden under the Human Rights Act.

A prima facie case of reprisal discrimination may be established by showing the following:

- (1) Statutorily protected conduct by the Employee;
- (2) Any adverse employment action by the employer; and
- (3) A casual connection between the two.

See Evans v. Ford Motor Co., 768 F.Supp. 1318, 1324 (D.Minn. 1991)

Under Hubbard v. United Press International, Inc. 330 N.W.2d 428, 444 (Minn. 1983), a causal connection can be established "indirectly by evidence of circumstances that justify an inference of retaliatory motive, such as showing that the employer has actual or imputed knowledge of the protected activity and the adverse employment action falls closely in time." Id. at 445. Any inference of retaliation created by the proximity in time of Gonzalez's complaints and her termination is overcome by an examination of the material facts.

If Gonzalez can meet this standard -- which she cannot -- the burden then shifts to Chi-Chi's to put forth a non-discriminatory reason for terminating Gonzalez.^[8] If Chi-Chi's can state such a reason -- which it can -- the burden of persuasion then shifts back to Gonzalez to show that Chi-Chi's reason for her discharge was a mere pretext for its alleged discriminatory conduct. Id. See also Ward v. Employee Development Corp., 516 N.W.2d 198, 202 (Minn. App. 1994).

The evidence is clear that Gonzalez's discharge was solely related to the disturbance that she created at the Chi-Chi's City Center restaurant on December 22, 1992. Christopher Lundgren ("Lundgren") testified in considerable detail about the confrontation that Gonzalez provoked in the dining room area of the City Center restaurant after leaving Laux's office. (T. 450, l. 22 - T. 454, l. 19). Certainly the encounter was not a casual conversation, as the hostess at the restaurant, on her own initiative, called security. (T. 453, l. 7-10). Lundgren testified that Gonzalez's confrontation "was disrupting my business . . ." (T. 453, l. 20-21). Lundgren further testified that after the confrontation he was "shaken up . . ." and he went to the office to inform Laux of the incident. (T. 454, l. 8-11).

Laux described Lundgren as "shaking because he was so upset about the confrontation that he just had had with Dolores and Arturo (Cuellar) in the restaurant." (T. 281, l. 2-4). Laux further testified that he felt Chi-Chi's business was being threatened, by which he meant:

“. . . that the scene that was created down in the dining room when she met with Chris Lundgren was disruptive to our business, people heard it from quite a distance away, and from the way Chris came up, he was pretty shaken up it looked like to me . . .”

(T. 285, l. 12-20).

Laux then called Margo McManus about the confrontation that Gonzalez had with Lundgren. The primary reason for the call, placed to McManus's home (T. 352, l. 1-3), was Lundgren's description of the confrontation with Gonzalez and the disruption that she caused. (T. 285, l. 23-25). McManus then spoke with three separate corporate managers, including Keith Streitenberg, the director of operations; Gary Kannenberg, one of the district managers whose responsibility included the Richfield store; and Bruce Good, one of the district managers whose responsibility included the City Center store. It was determined during those various discussions that Gonzalez should be terminated for her conduct at the City Center restaurant. (T. 352, l. 10 - T. 353, l. 4; T. 353, l. 25 - T. 354, l. 18). McManus then communicated the decision to terminate Gonzalez to Schmidt, who concurred in the decision. (T. 354, l. 19-23). Hyer never participated in the decision to terminate Gonzalez, nor was he even contacted about Gonzalez's termination after the decision had been reached. (T. 50, l. 6-16). McManus participated in the termination of Gonzalez since the other managers were concerned about retribution from Gonzalez. (T. 357, l. 8-13).

The evidence is clear that Gonzalez was terminated as the result of the confrontation that she had with Lundgren at the City Center restaurant. The ALJ is persuaded that her allegations of discrimination had nothing to do with her termination.

Therefore, any inference that Gonzalez was terminated for complaining about discrimination because of the close proximity in time of her complaints and her dismissal is immaterial. Such an inference may be drawn if the evidence is unclear, but the evidence that Gonzalez was fired for loud, disruptive behavior is strong and credible.

Even if the Complainant had made a prima facie case because of the proximity in time of her discrimination complaints and her termination, Chi-Chi's meets its burden of establishing a non-discriminatory reason for termination if the reason "taken as true, would permit the

conclusion that there was a non-discriminatory reason for the adverse action." Ward v. Employee Development Corp., 516 N.W.2d 198, 202 (Minn. Ct. App. 1994).

The evidence of the confrontation with Lundgren, including the disturbance caused in the presence of restaurant customers, Laux' observation of Lundgren immediately after the confrontation and his phone conversation with McManus, and McManus's phone conversations with Streitenberg, Kannenberg, and Good all lead to the same inescapable conclusion: Gonzalez was terminated for creating a disturbance at the Chi-Chi's City Center restaurant. Therefore, assuming that Gonzalez has established a prima facie case of reprisal, Chi-Chi's has met its burden of stating a legitimate, non-discriminatory reason for her termination.

Under this scenario, the Complainant must overcome Chi-Chi's stated reasons for termination and prove they are a pretext, but there is no evidence to suggest that they are pretextual. At a minimum, Gonzalez must show that "a substantial causative factor entering into the decision" to discharge her were her allegations of discrimination. See Anderson v. Hunter, Keith, Marshall & Co., 417 N.W.2d 619, 626 (Minn. 1988). Gonzalez's allegations were not a factor at all, let alone a substantial causative factor in Chi-Chi's decision to terminate her employment.

The Complainant argues that the facts that she told the Respondent she was going to the press and to a lawyer and was fired thereafter is evidence of pretext. The ALJ cannot agree. For argument's sake, that evidence is not enough, given the general overall credibility of Chi-Chi's stated reasons for firing Gonzalez to render their reasons "not worthy of belief", which is the standard for establishing a pretext. See Ward v. Employee Development Corp., supra, at 202.

The testimony of Laux, Lundgren, and McManus leaves no doubt that Gonzalez was terminated because of her confrontation with Lundgren and the resulting disturbance that she created at the City Center restaurant. It is significant that Laux did not call McManus until after the confrontation that Gonzalez provoked with Lundgren. Laux did not pick up the phone and call McManus when Gonzalez left his office, after stating, among other things, that she had been sexually harassed by a manager. Rather, it was only after Lundgren—who himself was shaken up by the events—reported to Laux what had transpired in the dining area, that Laux made the call to McManus. As Laux testified unequivocally, it was primarily because of the disturbance and disruption of the restaurant's business that he decided to make the call:

Q. You mentioned in your direct examination that you felt the business was being threatened. What did you mean by that?

A. Well, what I meant primarily by that was that the scene that was created down in the dining room when she met with Chris Lundgren was disruptive to our business, people heard it from quite a distance away, and from the way Chris came up, he was pretty shaken up it looked like to me, and I thought that it was definitely some sort of a threat to us and our business.

Q. Did you inform Ms. McManus of that when you called her?

A. That was the primary reason for the call.

(T. 285, l. 12-25). In brief, the conversation with Laux, the subsequent disturbance that Gonzalez created in the restaurant, and her threats to Lundgren collectively triggered Gonzalez's termination. As McManus clearly testified:

We were terminating her because of her behavior towards a general manager and the kitchen manager at City Center. She disrupted the business at City Center.

(T. 352, l. 24 - T. 353, l. 4).

Only if one were to conclude that McManus and Laux and Lundgren are lying, could one find that the reason given for Gonzalez's termination was a pretext or "unworthy of belief." There is no support for such a conclusion. The evidence regarding Gonzalez's termination shows the following:

1. Gonzalez accompanied Cuellar to confront Laux about the reason for Cuellar's termination.
2. The meeting with Laux was "quite confrontational" (T. 279, l. 11), and "she appeared to be threatening of some nature." (T. 279, l. 19-20).
3. After leaving Laux' office, Gonzalez confronted Lundgren, the kitchen manager at the City Center restaurant.
4. During the confrontation, it was apparent to Lundgren that Gonzalez was "getting a little more aggressive" (T. 451, l. 16).
5. The City Center hostess noticed the confrontation and called security. (T. 453, l. 708).
6. Gonzalez attempted to "set-up" Lundgren by stating into a tape recorder words to the effect "what are you going to do, push me?" (T. 453, l. 4-6, l. 8).
7. The confrontation occurred right in front of the dining room. (T. 454, l. 2-3).
8. The confrontation created a disturbance in the City Center restaurant, in the presence of customers. (T. 453, l. 20 - T. 454, l. 5).
9. Lundgren was "shaken up" (T. 454, l. 8) and immediately informed Laux of the incident. (T. 281, l. 2-4).
10. Immediately after the meeting with Lundgren, Laux called McManus at her home and reported the incident to her. (T. 282, l. 2-4; T. 352, l. 1-3).

11. McManus then "outlined the situation" to Keith Streitenberg, Bruce Good, and Gary Kannenberg, each of whom had managerial authority above the store level, as well as subsequently to Robert Schmidt, the general manager at the City Center restaurant. (T. 352, l. 12-16).
12. Based on McManus's discussion with Streitenberg, Good and Kannenberg, the conclusion was reached that Gonzalez "had exhibited misconduct in the City Center restaurant and that she should be terminated." (T. 352, l. 17-19).
13. Gonzalez's claims of sexual harassment and national origin discrimination were not discussed in reaching the decision to terminate Gonzalez. (T. 352, l. 20-22).

Given this evidence, it simply cannot be said that Chi-Chi's stated reason for terminating Gonzalez was a pretext. Rather, the evidence is clear that Gonzalez's claims of discrimination played no part in reaching the decision to terminate her.

Although Gonzalez's charges against Chi-Chi's are dismissed, the Administrative Law Judge notes he did not do so because of the fact that she is transsexual and therefore not entitled to the protections of the Minnesota Human Rights Act.

The Employer is correct in noting that discrimination based on "sexual orientation" (which arguably could cover transsexuality) was not forbidden explicitly until August 1, 1993, subsequent to the events analyzed in this case. The Complainant recognizes this because the allegation is sex discrimination due to sexual harassment.

The ALJ agrees with the reasoning by the Complainant in her Reply Brief, at pages 2-4. Because Gonzalez considered herself to be female, and was treated by the Employer as a female, sexual harassment against her by Hyer (if it occurred) was, legally, harassment of a female by a male. The Employer's reliance on Hopkins v. Baltimore Gas and Electric Co., Case #H-93-4167, 1994 U.S.C. Dist. LEXIS 18586 (D. Md., 12/28/94) is misplaced. That case stands for the proposition that the Federal Civil Rights Act does not cover a person claiming to be the victim of sexual harassment by a supervisor or co-worker of the same gender. From that, Chi-Chi's reasons that since both Hyer and Gonzalez are male, Gonzalez is not a member of a protected class. The Judge notes that while Gonzalez's genitalia are male, she considers herself female, has undergone surgery and drug treatment to become a female and was treated by the Employer as a female. She wears female clothes and makeup and uses a woman's name. Most importantly, the actions she charges Hyer with were of a sexual nature, directed at her as though she were female. On that basis, the Administrative Law Judge concludes Gonzalez was a member of a protected class for the purposes of establishing a prima facie claim of sexual harassment under the Human Rights Act.

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- [1] The Complainant is a transsexual (male to female) whose genitals are still those of a male. She considers herself a female. Unless otherwise noted, this Order refers to the Complainant as a female.
- [2] Respondent notes in its briefs that Chi-Chi's, Inc., the appropriate entity for service of process, was never named as a defendant or served in this proceeding. It has not moved to dismiss the case, however. The Administrative Law Judge notes that Chi-Chi's, Inc. has litigated this matter from its outset. By appearing at the hearing and contesting the charges on their merits, Chi-Chi's, Inc. has waived any insufficient process claim it may have had. Blaeser and Johnson, P.A. v. Kjellberg, 483 N.W.2d 98 (Minn. App. 1992).;
- [3] This complaint relates to an incident when Gonzalez slipped and fell, injuring herself at work. Her hospitalization was covered by the Employer, but the workers' compensation insurance carrier refused to pay other benefits. No violation of the Human Rights Act has been claimed in connection with this incident.
- [4] Evidently Gonzalez never contacted Janet or Bob Schmidt to express any concerns she allegedly had despite Hyer's suggestion and direction.
- [5] Not only is this version inconsistent with other versions stated by Gonzalez (i.e. that the broom penetrated her anus), it is physically impossible because Gonzalez has no vagina. (T. 222, l. 12-14).
- [6] Dr. Grove's definition of malingering is the "conscious, deliberate faking or manufacture of psychological or psychiatric problems . . ." (T. 905, l. 22-25).
- [7] The MMPI-2 given to Gonzalez was in Spanish. (T. 659, l. 10-12).
- [8] In her Charge, Gonzalez alleges that "[T]he reason given for my termination was that I had gone to another Respondent Restaurant to interpret for a friend, and that this was against Respondent policy." (Resp. Ex. 50). The ALJ notes there is no evidence in the record to suggest any such reason was given.